FREQUENTLY ASKED QUESTIONS (FAQ) SHEET
ON THE PROPOSED AMENDMENTS TO
HAWAII'S WATER QUALITY STANDARDS RULES (HAR 11-54)
July, 2002

Enforcement Policy

These rules establish standards for clean water in the state and prohibit water pollution that violates those standards.

Question 1: How will these rules be enforced? What is the sequence of enforcement actions that DOH conducts under federal Clean Water Act and State authority? What about "citizen suit" enforcement?

Answer 1 (for all sources):

DOH generally enforces progressively against violations, preferring to resolve matters quickly and informally, if possible. DOH investigations usually follow complaints or target serious pollution problems. DOH responses to violations range from oral warnings; through informal written warnings, called Notices of Apparent Violation; through formal administrative enforcement cases, with documents called Notices and Findings of Violation and Orders; to lawsuits. DOH responses depend on the specific case and on many factors, such as the seriousness of pollution, the speed and effectiveness of corrective action, prior violations, the type of violation (e.g., lack of permit, exceeding permit limits, non-reporting, concealment), and the history of the violation. While DOH may forego formal administrative enforcement and lawsuits if there is a one-time, minor incident, and prompt corrective action is taken, DOH always reserves the right to seek penalties and orders against violations.

A Notice and Finding of Violation and Order may contain monetary penalties and orders to correct a situation that is causing pollution. Monetary penalties are calculated using DOH's penalty policy, which uses information such as: amount of economic benefit the violator has obtained by being in noncompliance; severity of the violation; health and environmental risk; and record of past violations. Supplemental Environmental Projects (SEPs) may be used to offset part of the cash penalty, if appropriate.

DOH has not enforced against nonpoint sources of pollution. Polluted runoff enforcement will be governed by rules currently being considered under HRS chapter 342E. Prior to taking an enforcement action, DOH will consider many factors on a case-by-case basis.

Return flows from irrigated agriculture are excluded from coverage under the National Pollutant Discharge Elimination System (NPDES) permit program. Therefore, farmers do not need a permit for such return flows.

Citizens' suits scenarios:

Under the Hawaii Constitution, citizens can sue to enforce water quality standards, but the constitution and present statutes do not provide for any attorneys fees for water quality standards violations. Under the federal Clean Water Act, attorneys fees are available, but citizens must file a 60 day notice before suit. The suit is barred if the EPA or State is "diligently prosecuting" against the violation before suit is filed.

Antidegradation Policy

These draft rules include language very similar to the federal "antidegradation policy." This language is meant to help assure that water of high quality is maintained at that level.

Question 2:

Under the proposed "General policy of water quality antidegradation" (HAR 11-54-1.1(c)), there are provisions for naming **outstanding resource waters** (ORWs).

(A) How will **outstanding resource waters** be named, and by whom?
(B) Will the public have an opportunity to comment on the naming of these waters?
(C) Under the new language, can existing activities that may impact a newly named ORW trigger an "antidegradation analysis?"
(D) Will the state allow short-term changes in water quality in ORWs; and if so, add clarifying language to the rule?

Answer 2:

(A) ORWs will be specifically named through Chapter 91, HRS rulemaking procedures, which include a public hearing. No ORWs are proposed at this time. These waters will be identified in a Hawaii state (not federal) process.

These ORWs may be either Class 1a or AA waters; they are not placed in a separate class. Criteria for identifying ORWs are not described in the rule. Instead, DOH has added the following description to DOH's Antidegradation Policy Implementation Guidelines: "Specific existing class 1a and class AA waters may be identified as outstanding resource waters as research reports become available that contain evidence supporting the conclusion that the chemical, physical and biological characteristics of these waters are of exceptionally high quality."

No outstanding resource waters are proposed at this time. Criteria for identifying ORWs will be proposed at the time the chapter is next amended through the public hearing process.

Waters proposed to be **outstanding resource waters** must have unusually high water quality and resource value, as documented in research by resource agencies such as DLNR and USFWS, as well as DOH.

(B)Public comment on the naming of ORWs will be afforded through the rule-making process.

(C)Yes, an antidegradation analysis could be required if existing land uses affect or may affect the ORW (see HAR 11-54-1.1(c)). The antidegradation policy is applied differently for point sources versus nonpoint sources. Typically, for point sources, antidegradation analyses are triggered by permit applications. Nonpoint sources may be subject to an analysis in response to a complaint. For nonpoint sources, DOH would begin the consultation process, and a demonstration that all reasonable and cost-effective best management practices are in place and maintained would satisfy the antidegradation policy.

(D)The DOH intends to allow short-term, human-caused water quality changes in ORWs to the extent that water quality criteria continue to be met. However, in order to reserve the right to enforce against egregious short-term pollution events, no language will be added to specify the allowance for short-term changes.

Protection of "Existing Uses"

The antidegradation policy states that "existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."

Question 3:

Is any "existing use" currently achieved in state water also a protected or "designated" use? For example, is the existing use of water from a class 1 stream for irrigation purposes considered a "protected" or "designated" use?

Answer 3:

Designated uses are protected uses which are specified in section 3 of the rule for each class of State surface waters (see HAR 11-54-3(b)(1)(A)). Existing uses are also protected, but are not necessarily specified in the rule. HAR 11-54.1 defines 'existing uses' as "…those uses actually attained in the water body on or after November 28, 1975 whether or not they are included in the water quality standards." The generally accepted method for proving an existing use is through documentation.

For example, irrigation is not a designated use for Class 1 waters. If an irrigation diversion is located on a specified Class 1 stream reach, and can be documented as occurring on or after November 28, 1975, it would be an existing (protected) use. The intent of the rules is that both designated and existing uses be protected, but an existing use cannot impair a designated use or other existing uses.

However, as a result of public discussions and agency decisions, specific designated and existing uses may become high priorities for implementation in specific waters, and other uses relegated to lower priorities. Individuals or groups disagreeing with the priorities selected may pursue informal administrative actions, or, to the extent allowed by law, formal administrative cases or lawsuits.

Stream Classification
The draft rules name all perennial streams into different classifications, which are based on surrounding land uses.

Question 4:
(A)What impact does the classification of streams really have on the requirements for discharges, non-point source pollution and land uses?
(B)What are the regulatory impacts if a stream, passing through an agricultural or urban area, is reclassified from 2 to 1?
(C) How are the impaired or 'b' streams treated differently than 'a' streams by the DOH?

Answer 4:
(A) One purpose of the language in these rules is to prohibit point or nonpoint source pollution that **harms or tends to harm** the receiving waters. The rules prohibit the addition of "waste" to waters. Because the term "waste" incorporates the concept of "pollute or tend to pollute," the waste prohibition is against water pollution (see HRS 342D-1, definitions). The rule does not prohibit the addition of minor amounts of soil that accompany BMP-controlled runoff from various types of land uses in urban and agricultural districts because such minor amounts will not cause harm to the receiving waters.

(B) A project that will discharge from a point source on a class 1 stream will generally have more discharge/runoff restrictions placed on its permit than a similar project on a class 2 stream. This is because of the need to protect the higher uses of the class 1 water body. Projects that discharge from a point source into a class 1 stream must apply for an individual NPDES permit and are not eligible for a general permit. Individual permits cost more and take longer to process. Those projects are also more likely to require an antidegradation analysis. Note that, because of the rapid rate at which pollutants accumulate in streams which both lack riparian buffer zones and run through developed lands, it is highly unlikely that a Class 2 stream will be found to attain Class 1 water quality.

(C) In both "a" and "b" streams, water quality criteria must not be exceeded. Projects permitted to discharge from a point source on 'b' class streams will tend to have stricter controls because some or all of the water quality standards are already chronically exceeded in these waters. It is anticipated that, if/when TMDL plans are implemented, 'b' class streams will have more restrictive pollution control requirements for any point sources in order to bring these waters back into compliance with water quality standards.

<u>Impaired Waters</u>
These rules will classify streams that do not meet Water Quality Standards as "impaired," and they will be listed as "b" streams.

Question 5:
How will an impaired designation affect an adjacent landowner who wants to do a project in the stream or on land adjacent to the stream?

Answer 5:
For activities that do not require a permit (such as agriculture), these rules make no change to existing practice. Permit applications for work in impaired streams or point sources that may discharge into streams will be reviewed by the Clean Water Branch (CWB) & the Environmental Planning Office (EPO) to ensure that Best Management Practices (BMPs) will prevent the stream from being further degraded as a result of the construction activity and the operation of the project. The DOH will be especially concerned with long-term prospects for further degradation beyond the construction period. For non-point sources these rules do not create any restrictions beyond the existing prohibitions against causing or contributing to water quality standards violations.

Prohibited Waste Discharge
These rules attempt to clarify what is meant by a "discharge" into state waters.

Question 6:
(A) What is the impact of replacing "waste discharge into these waters is prohibited" with "the addition of waste into these waters is prohibited"? [HAR 11-54-3(b)(1)(A)&(B)]
(B) Is it a violation of DOH rules for an activity to add waste to a class 1 stream at a level that does not cause harm and where the water quality standards are still met?
(C) Are natural sources of pollution also restricted under this clause?

Answer 6:
(A) The new phrase intends to remove any confusion as to whether 'discharges' include non-point source pollution. The new phrase is a clarification, not a change in intended meaning. The intent of these rules is to prohibit harm to waters from all sources of pollution, both point and nonpoint.

(B) No. For example, a non-point source may add an insignificant amount of material that does not rise to the level of "waste," does not cause harm or "pollute or tend to pollute." Any discharge from a point source must conform to limits placed on a permit. Compliance with the antidegradation policy must be maintained.

(C) No. Current law prohibits "persons" from discharging or causing or allowing "pollutants" to enter state waters (see HRS 342D-50(a)). Erosion from undeveloped lands that is not generated by human activates is not considered a discharge by a "person."

Waste from Agricultural Sources

Question 7:
Because HAR 11-54-4(c) specifies that "land on which the erosion occurred…being managed in accordance with soil conservation practices…" meets the requirement in 11-54-4(a), does that mean that farms complying with 11-54-4(c) are also in compliance with the "addition of waste" prohibition?

Answer 7:
Not necessarily. "Waste" includes many more materials than soil (see definition in HRS 342D), and BMPs for erosion control that have not been properly installed and maintained may fail. Conditions listed in the narrative criteria plus any numeric criteria for the water body type in question (both found in HAR 11-54-4, 11-54-5 and11-54-6) must also be met, but proof of "harm" must be shown before any exceedances are regarded as a violation.

Question 8:
Do the revised rules allow enforcement (whether by DOH, EPA or citizen suits) stemming from an unusually large rain event causing runoff that causes harm and/or violates WQS, despite appropriate BMPs?

Answer 8:
Yes. DOH always reserves the right to enforce against violations of the Water Quality Standards, and citizens may sue to enforce against violations of WQS. However, the protection afforded under HAR 11-54-4(c) may apply. If the storm was extreme, and BMPs were being properly installed and managed, then DOH would not normally take enforcement action.

Water Quality Criteria

Question 9:
What specific portions of the proposed changes to the water quality standards are being required by EPA? For proposed changes that are not being required by EPA, why does Hawaii need to make those changes at this time?

Answer 9:
The EPA requires that these rules be reviewed every three years and updated if necessary to conform to the latest scientific understanding, EPA rules, and final court decisions. The following provisions are being added to the draft rule at the specific behest of EPA:

i. HAR 11-54-1: Amending the definition of "State waters" to avoid a conflict with the federal definition of waters of the U.S.; specifically to clarify that certain irrigation ditches, flumes, ponds and reservoirs which are considered "waters of the United States" under federal regulations are also considered State waters.

ii. HAR 11-54-1.1: Updating and expanding the language in the "antidegradation policy" to more closely conform to the federal regulation. Current language does not implement the federal requirements as described in 40 CFR 131.12(a)(1) and (3). Also, with regard to waters whose quality is above the standards, current text is missing the proper references to intergovernmental coordination and public participation, protecting existing uses, and the means to protect those uses as described in 40 CFR 131.12(a)(2).

iii. HAR 11-54-3: Updating and clarifying the classification of inland waters to ensure that all inland water bodies are named into classes. At present, every point in the coastal waters along the state's coastlines is assigned in the rule to either Class A or Class AA [see 11-54-06(b)(2)]. However, inland water bodies are not named and identified by class; therefore EPA considers the State's classification system for surface waters incomplete. We are starting with perennial streams; in a future revision we will include estuaries.

iv. HAR 11-54-4(e): Providing some liability protection for persons applying pesticides and herbicides to State surface waters by defining conditions under which such applications can take place.

v. HAR 11-54-8(1): Adopting the EPA national enterococcus criterion of 33 CFU/100ml for inland waters.

The EPA must approve all the language in these rules. If the Governor signs a rule which it subsequently disapproves, then EPA has a statutory mandate to revise the rule at the federal level within a fixed time period, or to require the state to make the necessary revisions. While the state maintains the right and assumes the responsibility to craft rules that make sense for Hawaii, the language in these rules is negotiated between EPA and DOH. Because of this, it is difficult to say exactly which provisions are being "required" by EPA. Regardless of any particular mandate, the Department feels that all the provisions in these draft rules are needed at this time to update our program and improve the management of water quality in the state.

Biological Criteria

These rules describe a method of ranking the quality of streams by assessing the populations of living things in the stream ecosystem.

Question 19:

Can a stream be listed as impaired, or 'b' class solely by not meeting habitat and biotic integrity data?

Answer 10:

No. Newly revised language in HAR 11-54-5.2(b)(3), states: "These criteria shall be used together with the water column criteria in section 11-54-5.2(b) for stream classification purposes." In other words, DOH intends to use a balance of all available data, including

physical, chemical and biological data. A stream may be listed as "impaired" on the basis of exceedance of either the numeric criteria for streams (HAR 11-54-05.2(b)(1)) or the narrative criteria and list of toxic substances found in HAR 11-54-04), but the habitat and biotic criteria are clearly defined in the rule as tools for stream classification only, and cannot be used independently of the physical and chemical criteria.

Question 11:
In light of the publication of a paper which seems to invalidate the Hawaii Stream Biological Protocol (HSBP) as a reliable method of assessing the health of Hawaiian streams systems, how is it appropriate to use the Kido bioassessment protocol as a standard for assessing water quality?

Answer 11:
Other methods of stream assessment may be valid for other purposes. To conduct bioassessments for Clean Water Act purposes, reference conditions, a scoring system, rapid field assessment protocols and quality assurance plans must have been developed. Elements of other approaches may be incorporated into the HSBP over time. DOH's use of bioassessment methods will be restricted to water quality-related work and not include the full range of aquatic resource and streamflow evaluation methods used by other agencies.

Impact on Taro Lo`i

Question 12:
Will taro lo`i need an NPDES permit to discharge back into streams? Will they be able to discharge into Class 1 streams?

Answer 12:
Return flows from irrigated agriculture are exempt from NPDES permit requirements under 40 CFR 122.3(f). However, the addition of pollutants such as pesticides and fertilizers may lead to regulation (see the recent Talent case on the 9th Circuit Court). To date, DOH has not required NPDES permits for lo`i operation. Lo`i return flows are allowed in class 1 or class 2 streams so long as the uses and level of water quality are maintained. The "addition of waste" that creates pollution would cause HAR 11-54-3(1)(A) & (B) to apply.

Impact on the DLNR Water Commission

To clarify the relationship between these rules and the responsibility of the State Water Commission, the following language was added to the draft rules:

> "This section is not intended to supercede, abrogate or otherwise impair the authority of CWRM to allocate quantities of water or establish instream flow standards or otherwise regulate the use of streams or other surface waters under chapter 174C, HRS,"

Question 13:
Does this mean that the Water Commission and other agencies like the Land Board, involved in water allocation/lease decisions are not required to consider the DOH water quality standards when making water allocation decisions? For example, if a stream does not meet the habitat and biotic criteria for class 1a or class 2a, wouldn't this affect those agencies' decisions on future or even current diversions? Another example of language that has been added to the rule which may have to be considered by other agencies or decision-making bodies is "To the extent possible, the wilderness character of these areas shall be protected and the condition of water quality, stream habitat, and native aquatic communities shall be consistent with the criteria described in section 11-54-5." [see HAR 11-54-3]

Answer 13:
The details of the interaction between the Water Commission, other government agencies, and DOH are evolving. DOH believes that state law, including the water code, recognizes DOH's authority to set water quality standards (HRS § 174C-66, Jurisdiction over water quality). HRS § 174C-71(1)(E) requires the Water Commission to consult with and consider DOH recommendations on in-stream uses, among other things. The Hawaii DOH is hopeful that all state agencies that make decisions that impact water quality will make full use of all pertinent information, including the data gained and determinations made under the Water Quality Standards. Other agencies in their regulatory capacities are not presently specifically required to base their decisions on habitat and biotic integrity criteria. However, permit conditions in any water pollution control permits issued to other agencies must be met.